137-62

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 345. 78 10

THE WASHINGTON MARKET COMPANY, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA; SETH L. PHELPS, JOSIAH DENT, AND WILLIAM J. TWINING, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JAMES GILFILLAN, TREASURER OF THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 17, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 345.

THE WASHINGTON MARKET COMPANY, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA; SETH L. PHELPS, JOSIAH DENT, AND WILLIAM J. TWINING, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JAMES GILFILLAN, TREASURER OF THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Original bill	1	1
Restraining order	13	5
Subpœna	14	5
Marshal's return	15	6
Reference to attorney of D. C., and acceptance of service	16	6
Answer	17	6
Decree *pro confesso*	22	8
Decree making absolute *pro confesso*	23	8
Stipulation to continue	25	9
Motion to vacate decree *pro confesso* (lost)	26	9
Order overruling motion to vacate decree *pro confesso*	27	10
Order granting motion to withdraw answer, &c.	28	10
Demurrer (lost)	29	10
Decree sustaining demurrer, &c.	30	11
Note of appeal	30	11
Bond on appeal to general term	31	11
Decree in general term	32	12
Bond	33	12
Certificate to record	35	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 7, 1888.

1 Copy.

Original Bill. Filed Oct. 31st, 1878. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia. In Equity.

THE WASHINGTON MARKET COMPANY
vs.
THE DISTRICT OF COLUMBIA; SETH L. PHELPS, Josiah Dent, William J. Twining, Commissioners of the District of Columbia, and James Gilfillan, Treasurer of the United States. } No. 6486, Docket 18.

To the supreme court of the District of Columbia, holding a special term:

The bill of complaint of the above-named complainant, The Washington Market Company, respectfully shows as follows:

1st. The complainant is a body corporate under the laws of the United States, with power to sue and be sued, having its habitat in the District of Columbia.

2d. The defendant, The District of Columbia, is a municipal corporation; the defendants, Seth L. Phelps, Josiah Dent, and William J. Twining, are Commissioners of said District, appointed by the President of the United States, under an act of Congress approved June 11, 1878, and are sued as such; the defendant, James
2 Gilfillan, is Treasurer of the United States and custodian, as such officer, of certain assessment certificates hereinafter mentioned and described.

3. Complainant further shows that heretofore, to wit, prior to the 20th day of May, 1870, the United States was and it ever since has been and it still is the owner of certain grounds and lands in the city of Washington, District of Columbia, known as reservation No. 7, the same having a frontage on "B" street N. W. of 498 feet 8 inches, on Seventh street N. W. of 279.444 feet, and on Ninth street northwest of 298.612 feet more or less; that by the act of Congress creating the complainant corporation it was duly authorized and empowered to locate and construct a market building upon the said reservation and to use and occupy the same for a period of ninety-nine years unless its estate should be sooner determined in manner in said act provided; and complainant says that it thereby became the tenant of the said United States, possessed only of a limited estate in said reservation No. 7.

4. That by section 37 of a certain act of Congress entitled
3 "An act to provide a government for the District of Columbia," approved February 21, 1871, and commonly known as "the organic act," it was provided that for the improvement of streets, avenues, &c., as therein provided for, there should be assessed upon the property adjoining and to be specially benefitted by the improvement "a reasonable proportion of the cost of the improvement, not exceeding

one-third of such cost, which sum shall be collected as all other taxes are collected;" and afterward and in furtherance of said provision of law it was provided by act of the Legislative Assembly of the said District, approved August 10, 1871, that if any person or persons notified in manner provided in said act "should neglect or refuse to pay the amount assessed against his or their property as aforesaid"—that is to say, for the improvement of the streets, avenues, &c., adjoining the same—after the expiration of thirty days the Board of Public Works of said District should immediately thereafter issue certificates of indebtedness against the property aforesaid, which certificates should bear interest, until paid, at the rate of ten per centum per annum, and until paid the assessment and certificate should
4 remain and be a lien upon the property against which it should be issued; and it was further provided that upon failure to pay said assessment within one year the said Board of Public Works, whose successors the Commissioners here sued are, should, upon the application of the holder of the certificate of indebtedness, proceed to sell the property against which the assessment and the certificate exist at public auction to the highest bidder, and that such property should then be conveyed by the deed to the purchaser, which deed should be deemed and held to convey a good and perfect title.

And afterwards, to wit, in the month of April, 1871, the said Board of Public Works, acting under the statutory power aforesaid, caused B street north, between Seventh and Ninth streets west, to be paved, guttered, and otherwise improved, and plaintiff charges that the entire cost of said improvement, including the intersections of B street with Seventh and Ninth street- aforesaid, was $14,262.87 and no more; and thereupon the said Board of Public Works assessed against the United States, as owner of all the property adjoining the said improvement, the full cost thereof, which was, with full knowledge of
5 the facts on his part and on the part of the other auditing officers of the United States, paid in full by the assistant treasurer of the United States to the treasurer of the said Board of Public Works on the 25th day of July, 1873, as fully appears in a certain official publication entitled "District Affairs, 1874, Governor's Answer," page- 419, 420. Said amount so paid has never been repaid the United States nor has any demand been made for repayment; but plaintiff says that, notwithstanding the said payment of the whole cost of the said improvement by the United States as aforesaid, the said Board of Public Works afterward, to wit, January 19, 1874, assessed against the complainant for the said improvement on B street the sum of $4,402.45 and demanded that complainant should pay the same, and upon complainant's refusal so to do the said board issued a certificate of indebtedness for the said sum of $4,402.45 against the property of complainant in said reservation No. 7 and deposited the same with the commissioners of the sinking fund, from whom it afterward passed to the defendant, James Gilfillan, who, as Treasurer of the United States, is the successor in law of the
6 said sinking fund commissioners, where it now is. Said certificate is numbered 5247 and, with the assessment upon which

it is based, constitutes an apparent lien on the property of complainant.

6. Complainant further says that, aside from the entire illegality of the said assessment and certificate because of the previous payment by the United States of the whole cost of said improvement, the said assessment is grossly and fraudulently excessive and exorbitant; that, as aforesaid stated, the whole cost to the said Board of Public Works for said improvement between Seventh and Ninth streets, including street intersections, for which adjoining property was not liable, was $14,262.27 and no more. The total frontage on B street covered by said charge was, to wit, 570 feet — inches; and plaintiff says that one-sixth of said total cost and no more was chargeable in law to the property on the north side of said B street adjoining the said improvement and specially benefitted thereby, and that without the payment by the United States, as hereinbefore recited,
7 the amount of such cost properly chargeable against the 498 feet 8 inches occupied by the complainant was $2,079.44 and no more.

7. And afterward the said Board of Public Works, acting under the statutory power aforesaid, caused that part of Seventh street northwest adjoining said reservation No. 7 to be paved, graded, and otherwise improved; and plaintiff charges that the total cost of the said improvement from side to side of said street was $8,557.00 and no more; and thereupon the said Board of Public Works assessed against the United States as owner of the said reservation No. 7 the sum of $7,426.16, or $\frac{5}{6}$ of the whole cost of said improvement, and assessed the remaining one-sixth part of said cost upon the private property on the east side of Seventh street and abutting thereon; and complainant avers that the said charge against the United States for the work aforesaid afterwards, to wit, July 25, 1873, with full knowledge of the facts, was paid in full by the United States to the treasurer of the said Board of Public Works; and complainant is advised and believes, and so believing charges, that said payment fully discharged all claim or right which the said Board of Public
8 Works had or could have againt said reservation No. 7 by reason of the said improvement of Seventh street aforesaid; but plaintiff says that, notwithstanding the payment aforesaid, the Commissioners of the District of Columbia, successors to the said Board of Public Works, erroneously assumed the right to again assess the said reservation No. 7 for the said improvement, and on, to wit, September 3, 1875, levied an assessment thereon in the name of complainant for the sum of $1,691.85 and demanded that complainant should pay the same; and upon the refusal of complainant so to do the said Commissioners issued certificate of indebtedness No. 8286 for the said sum of $1,691.85 against the property of complainant in said reservation No. 7 and deposited the same with the commissioners of the sinking fund, from whom it afterward passed to the defendant, James Gilfillan, who is, as Treasurer of the United States, the successor of the said sinking fund commission, and said defendant yet holds the same, which, with the assessment upon which it is based, constitutes an apparent lien on the property of complainant.

9 Complainant further charges that the said amount, to wit, $1,691.85, so assessed to complainant was much more than one-sixth part of the total cost of said improvement of Seventh street, which proportion only was authorized by law to be assessed upon adjoining property; and complainant says that one-sixth of the total cost of said improvement was $1,426.16 and no more.

And complainant further says that it is advised that the said defendants propose to proceed to sell the said property of complainant for the non-payment of the said two special assessments for the improvement of B street and Seventh street aforesaid and for the satisfaction of the two certificates held by the said James Gilfillan, with ten per cent. interest per annum from their respective dates, as if authorized so to do by existing laws, and will sell the same unless restrained by this honorable court.

Wherefore, and forasmuch as the complainant can have no relief save in this honorable court, where such things are prop-
10 erly cognizable, the complainant prays as follows:

Prayers.

First. That the United States writ of subpœna may be reissued requiring the defendants to make answer hereto under oath.

Second. That an order may be made restraining the said defendants, The Commissioners of the District of Columbia, from selling or attempting to sell or in any manner interrfering with the said property of complainant, on account of the assessments hereinbefore recited, during the pendency of this suit.

Third. That upon final hearing the defendants and each of them, their agents, attorneys, and employés, may be forever enjoined from selling or attempting to sell or in any manner interfering with the property of complainant and from setting up any claim thereto or lien thereon by reason of the said assessments or either of them, and that the said two certificates, Nos. 5247 and 8286, issued against the property of complainant in reservation No. 7, as set out in this bill, may be decreed to be null and void and be ordered cancelled.

11 And that complainant may have such other and further relief as the nature of the case may require and the court have power to grant.

In witness whereof the said complainant, The Washington Market Company, has caused its common seal to be hereto attached by Matthew G. Emery, its president.

BIRNEY & BIRNEY,
Solicitors for Complainant.

I, Matthew G. Emery, being duly sworn, say that I am president of The Washington Market Company, the plaintiff; that the seal of said corporation has been affixed by me, with its authority, to the above bill; that I have read the said bill and know the contents thereof, and that the facts therein stated upon my personal knowl-

edge are true, and that the facts therein stated upon information and belief I believe to be true.

[Seal Washington Market Co.]

MATTHEW G. EMERY,
Pres't of the Washington Market Co.

12 Sworn to and subscribed before me this 30th day of October, A. D. 1878.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk.*

13 *Restraining Order.*

The defendant is hereby restrained, as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing which is fixed for the 9th day of Nov., 1878, of which take notice.

By the court:

MACARTHUR, *Justice.*

14 *Subpœna to Answer.*

In the Supreme Court of the District of Columbia, the 31 Day of Oct., 1878.

THE WASHINGTON MARKET CO., Complainant, *against* THE DISTRICT OF COLUMBIA *et al.*, Defendants. } No. 6486, Eq'y Dock. 18.

The President of the United States to The District of Columbia; Seth L. Phelps, Josiah Dent, William J. Twining, Commissioners of the District of Columbia; James Gilfillan, Treasurer of the United States, defendant-:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the bill this day filed and entitled as above, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk.*

MEMORANDUM.—*That* the defendant- herewith served *is* to enter their appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

15 *Marshal's Return.*

WASHINGTON MARKET CO. *vs.* DIST. OF COLUMBIA.

Issued Oct. 31, 1878; returned —— —, 18—.

Summoned and served notice of injunction on the def't, Dist of Columbia, by service on Seth L. Phelps, Commissioner, Nov. 1st, 1878, and served James Gilfillan, Treasurer, Nov. 1st, 1878.

F. DOUGLASS, *Marshal.*

16 *Reference to Attorney by Commissioners Nov.* 1, 1878.

Respectfully referred to the attorney D. C. for attention.

By order—

WILLIAM TINDALL, *Sec'y.*

Nov. 1, 1878.

Board of Commissioners of the District of Columbia. Received Nov. 1, 1878.

Docketed. Return of Restraining Order.

Service accepted for def'ts, all by—

A. G. RIDDLE.

Nov. 2, 1878.

17 *Ans. Def't, Dist. of Col. Filed Nov.* 9, 1878. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia. In Equity.

THE WASHINGON MARKET COMPANY *vs.* THE DISTRICT OF COLUMBIA; SETH L. PHELPS, JOSIAH Dent, William J. Twining, Commissioners of the District of Columbia, and James Gilfillan, Treasurer of the United States. } No. 6486.

Answer of the District of Columbia to the bill of complaint of the Washington Market Company.

This defendant, The District of Columbia, now and at all times hereafter reserving to itself all benefit of exception to the many errors and imperfections in said bill contained, answering, says:

1, 2. The defendant admits the allegations of the first and second paragraphs of said bill.

3. The defendant admits that the title in fee in reservation 7 is in the United States, subject to the rights of the complainant under its charter of May 20th, 1870 (16 Stat. at L., p. 124), which said right of the complainant is by the 13th section of said act declared

18 to be a determinable fee; that said complainant holds the same for the period and with the rights set forth in the third

paragraph of its bill, though the defendant does not admit that by its holding under said act that it is, legally speaking, a tenant of the United States. Said 13th section also declares that all the real and personal property of the complainant shall be subject to assessment and taxation for all District and municipal purposes in the same manner and to the same extent that like property in the city of Washington owned and possessed by individuals is liable to assessment and taxation; and the defendant avers that the property of individuals in the neighborhood of the improvement described in said bill is liable and has been assessed for the cost of the same in like manner and to the same extent as was the property of the complainant.

4. The defendant admits that the acts of Congress and of the late District Legislature are set forth with reasonable accuracy in the fourth paragraph of said bill.

19 5. In answer to the fifth paragraph of said bill the defendant says that the Board of Public Works made the improvements mentioned therein, and it denies that its assessments for the cost thereof *was* illegal or excessive;* that so far as the amounts are involved, if the same are shown to be excessive upon the complainant's property, there is now ample remedy for the same under the act of Congress of June 19, 1878, as the complainant well knows, and the defendant says that the complainant is without remedy in this respect, at least, until it shows that it has applied to the Commissioners of the District under said act, and that they have refused to take the proper action in the premises.

And the defendant says the United States paid no more than its just proportion, and that if it can be made to appear that the United States has paid a sum of money to the District, on account of said improvement, in excess of the whole cost of the same, as alleged by the complainant, that such action did not and could not

20 accrue to the benefit of the complainant, nor can such payment by the United States be taken as for or on account of the complainant any more that on account of and for any other private owner whose property had been assessed for said improvement, and that the defendant is not and cannot be precluded from collecting said assessment from the complainant by reason of such showing on its part in the premises.

6. Answering the sixth paragraph, the defendant says that the legal remedy for the alleged excessive amount of the assessment which it denies to exist* is by application to the Commissioners under the act of Congress of June 19, 1878, and not to this court, as set forth in said fifth paragraph.

7. The defendant says that Seventh street was improved as set forth in paragraph seventh of said bill (and there was assessed upon the complainant's property its just share of the costs of the same and no more, and the United States paid no more than its just proportion),* and that matters and things set forth in said seventh

* Struck out by consent. A. G. R. B. & B.

paragraph constitute no ground in law for the intervention of this court to restrain the District from the enforcement of said
21 assessment in manner and form as the complainant hath prayed, and for the reason that the payments of the United States, even if in excess of its proportion, *was* not made for or on account of the complainant, and did not and could not accrue for its benefit. That the complainant sustains the same relation to the District in the premises as do all other property owners, and the fact that the fee of the land it holds is in the United States can and does in no way change that relation or enable it to claim that any part of the money paid by the United States to the District can be taken to discharge any part of said assessment upon its property.

And now, having fully answered, this defendant prays that it may be hence dismissed with its reasonable costs in this behalf unjustly incurred.

[Seal District of Columbia.]

A. G. RIDDLE,
Att'y D. C.

22 *Decree Pro Confesso. Filed Dec.* 21*st*, 1878. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

THE WASHINGTON MARKET COMPANY
vs.
THE DISTRICT OF COLUMBIA *et al.* } Equity No. 6486.

Upon motion of counsel for complainant, and it appearing to the court that the defendants, Seth L. Phelps, William J. Twining, and Josiah Dent and James Gilfillan, have not caused their appearance to be entered in this cause within the time limited by law, although duly summoned so to do, it is, this 21st day of December, 1878, ordered and decreed that the said bill of complaint be, and the same is hereby, taken as confessed as against the said defendants hereinabove named.

By the court:

MACARTHUR, *Justice.*

23 *Decree Making Absolute Pro Confesso. Filed Apr.* 2, 1879. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

THE WASHINGTON MARKET COMPANY
vs.
THE DISTRICT OF COLUMBIA *et al.* } No. 6486, Eq. Doc. 18.

Upon motion of the complainant, by its solicitors, it is this 2nd day of April, 1879, ordered and decreed that the decree *pro confesso* passed herein on the 21st day of December, 1878, against the de-

fendants, Seth L. Phelps, Josiah Dent, William J. Twining, Commissioners of the District of Columbia, and James Gilfillan, Treasurer of the United States, be, and the same hereby is, made absolute and final.

And it is further ordered, adjudged, and decreed that the said defendants above named and each of them, their successors in office, and their agents, attorneys, and employés, be, and they hereby are, forever enjoined from selling or attempting to sell or in any manner interfering with the real estate of complainant known as "Reservation No. 7," in Washington city, District of Columbia, and from setting up any claim thereto or lien thereon or any parts thereof,
24 either by reason of the alleged assessment, made January 19, 1874, by the late Board of Public Works of said District, of the sum of $4,402.45 for the improvement of B street northwest, and for which assessment certificate No. 5247, now held by said James Gilfillan, Treasurer, &c., was issued, or by reason of the alleged assessment, made, to wit, September 3, 1875, by the then Commissioners of the District of Columbia, for the sum of, to wit, $1,691.85, for the improvement of Seventh street northwest, and for which assessment certificate No. 8286, now held by said James Gillfillan, Treasurer, &c., was issued.

And it is further ordered and decreed that said James Gilfillan, Treasurer, &c., and his successors in the custody of said certificates be, and he and they hereby are, forever enjoined from making application to said Commissioners or to their successors in office for a sale of said reservation No. 7, or of any part thereof, for satisfaction, or by virtue of said certificates of indebtedness Nos. 5247 and 8286 or of either of them.

By the court:

MACARTHUR, *Justice.*

25 *Stipulation to Continue Cause to May Term*, 1879. *Filed Apr.* 3, 1879. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, this the third day of April, 1879.

THE WASHINGTON MARKET COMPANY
vs.
THE DISTRICT OF COLUMBIA *et al.* } No. 6486, Eq. Docket 18.

Stipulated that the above cause shall be continued to May special term, in equity.

BIRNEY & BIRNEY,
Solicitors for Complainant.
A. G. RIDDLE, *For D. C.*

26 *Motion to Set Aside Decree Pro Confesso. Filed Ap'l 7, '79.*

This is to certify that diligent search has been made for the mo-

tion to set aside *pro confesso* passed herein April 7, 1879, and the same has not been found.

Test:

R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, JR., *Ass't Clk.*

27 *Motion to Vacate Decree of April 2, '79, Overruled. M. 15, p. 167.*

Supreme Court of the District of Columbia.

THE WASHINGTON MARKET COMPANY
vs.
THE DISTRICT OF COLUMBIA. } 6486, Equity Docket 18.

This cause came on to be heard on the 26th day of April, 1879, upon motion of the solicitor for the defendant, The District of Columbia, to vacate the decree entered herein on the 2d day of April, 1879, whereupon it was, with the consent of said solicitor for said defendant, ordered that said motion be, and the same was then, overruled.

Signed now for then this 8th day of November, 1879.

By the court:

MACARTHUR, *Justice.*

28 *Motion to Withdraw Ans. & for Leave to Demur Granted. M. 16, p. 39.*

Supreme Court of the District of Columbia.

THE WASHINGTON MARKET COMPANY
vs.
THE DISTRICT OF COLUMBIA. } 6486, Equity Docket 18.

On motion of the defendant, The District of Columbia, it is, this 7th day of June, A. D. 1880, ordered that said defendant, The District of Columbia, have leave to withdraw its answer in this cause filed and to demur to complainant's bill, but such demurrer shall be filed within ten days from the passing of this order.

By the court:

W. S. COX, *Justice.*

29 *Demurrer Lost.*

This is to certify that the demurrer filed herein in pursuance of the order authorizing same cannot be found, although diligent search has been made for it.

Sept. 10, 1886.

Test:

R. J. MEIGS, *Clk,*
By R. J. MEIGS, JR., *Ass't Clk.*

30 *Decree Sustaining Demurrer & Dismissing Bill. Filed Oct.* 6, 1885. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

THE WASHINGTON MARKET COMPANY *against* THE DISTRICT OF COLUMBIA and Others. } Equity No. 6486.

This cause coming on — be considered by the court on the bill of complaint and the demurrer thereto of the defendant, The District of Columbia, and being by the court considered, it is, this 6th day of October, A. D. 1885, adjudged, ordered, and decreed that the said demurrer be, and it hereby is, sustained, and that the said bill of complaint be, and it hereby is, dismissed, with costs.

A. B. HAGNER.

At the request of Gen'l Birney, the judge here notes that he gives notice of an appeal from this order.

Oct. 6, '85.

A. B. H.

31 *Undertaking for Appeal by Complainant. Filed Oct.* 12, 1885. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, the — day of October, 1885.

THE WASHINGTON MARKET COMPANY, Complainant, *vs.* THE DISTRICT OF COLUMBIA *et al.*, Defendants. } No. 6486, Equity Docket.

The complainant, having appealed to the general term from the decree pronounced herein on the sixth of October, 1885, in the special term, equity court, and Matthew G. Emery, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

[Seal Washington Market Co.]

THE WASHINGTON MARKET CO.,
By M. G. EMERY, *Pres't.*
M. G. EMERY, *Surety.*

Approved Oct. 12, '85.

A. B. HAGNER.

32 *Decree Gen'l Term Affirming Decree Below. Filed Mar.* 8, 1886. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, in General Term.

THE WASHINGTON MARKET COMPANY, Complainant, *against* THE DISTRICT OF COLUMBIA and Others, Defendants. } Equity No. 6486.

This cause coming on to be considered by the court on appeal by the complainant from the decree of the special term passed therein on the sixth day of October, A. D. 1885, and having been argued by counsel and considered by the court, it is, this eighth day of March, A. D. 1886, adjudged, ordered, and decreed that the said decree of the special term be, and it hereby is, affirmed, with costs; and from this decree the complainant prays an appeal to the Supreme Court of the United States, which is hereby allowed.

By the court:

D. K. CARTTER, *Ch'f Just.*

33 *Appeal Bond. Filed Mar.* 29, 1886. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, the 25th day of March, 1886. In Equity.

THE WASHINGTON MARKET COMPANY, Appellant, *vs.* THE DISTRICT OF COLUMBIA, SETH L. PHELPS, JOSIAH DENT, WILLIAM J. TWINING, Commissioners of the District of Columbia, & JAMES GILFILLAN, Treasurer of the United States (Appellees). } No. 6486.

In error.

Know all men by these presents that we, The Washington Market Company, William E. Chandler, and N. G. Ordway, are bound unto the above-named appellees in the sum of five hundred dollars, to be paid to the said appellees and their legal representatives; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 25th day of March, 1886.

Whereas the above-named "The Washington Market Company" has prosecuted its appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said

34 supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named appellant shall prosecute its said appeal to effect and an-

swer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE WASHINGTON MARKET COMPANY,
By SAM'L W. CURRIDEN, *Treasurer.*
WM. E. CHANDLER.
N. G. ORDWAY.

Sealed and delivered in presence of—

JOHN CASSELS.
WILLIAM BIRNEY.

Approved March 29th, 1886.

D. K. CARTTER, *Ch'f Just.*

35 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 10th day of Sept., 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 10th day of Sept., 1886.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, —— ——, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 10th day of Sept., 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Endorsed on cover: Dist. of Columbia supreme court. No. 345. The Washington Market Company, appellant, *vs.* The District of Columbia, Seth L. Phelps, Josiah Dent, & William J. Twining, Commissioners of the District of Columbia, and James Gilfillan, Treasurer of the United States. Filed September 17, 1886.

Office Supreme Court U. S.
FILED.
OCT 21 1890
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 10.

THE WASHINGTON MARKET COMPANY, *Appellant.*

vs.

THE DISTRICT OF COLUMBIA ET AL.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Appellant's Brief, in Reply,

By WILLIAM BIRNEY, its attorney.

1. The brief of appellee fails to show any interest of the District of Columbia in the subject-matter of the suit, or that there was any relief which the appellant could have asked against it, or that it had in relation to the certificates any power which could have been reached by injunction.

The bill of complaint treats the District as a formal and nominal party only. A decree against it was not essential to the relief sought.

Ward vs. Arredondo et al., 1 Paine, 410.

That it was improperly joined as defendant cannot affect the jurisdiction of the court as to other parties who are properly before it.

Carneal vs. Banks, 10 Wheat., 181.

"This court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties."

Wormley vs. Wormley, 8 Wheat., 421.

2. The Treasurer of the United States, successor to the Sinking Fund Commissioners (Organic Act, June 11, 1878), and the District Commissioners as successors of the Board of Public Works, were the real defendants. The former held all lien certificates as trustee for the holders of the 8 per cent. scrip paid for street improvements, the lien certificates being pledged for the payment of the scrip, and to be applied "*for no other uses or purposes whatever*" (Leg. Act of May 29, 1873), and he could request the Commissioners to sell the property. It was the duty of the latter to sell on this request (Act of August 10, 1871). After the payment of contractors in 8 per cent. scrip, the District was free from all liability, the holders of the scrip relying exclusively upon their security in the hands of the Treasurer. If property owners paid assessments in cash, as in this case, this was paid to the contractors; the expenditure being reimbursed, neither scrip nor lien certificates could legally be issued.

3. In order to justify the enlargement of the decree so as to include the dismissal of the bill as to all the defendants, it was incumbent on the appellee to show a *joint* power with the other defendants. In that case no injunction could be had against some and not all. They stood or fell together. In *Clason vs. Morris* (10 Johnson, 537), a decree *pro confesso* against one defendant was vacated on final decree on the merits in favor of the other; but Spencer, J., based the decision upon the *joint* interest of the defendants. The same principle was adopted by this court in *Frow vs. De La Vega* (15 Wall.), in which the charge was of *joint* conspiracy.

In no part of the record is there any trace of a power, interest or obligation shared by the District of Columbia

jointly with the other defendants. The bill might have been dismissed as to the District for *misjoinder*, but without prejudice to the absolute decree against the real defendants.

4. The argument below on the demurrer should have been confined to the bill *as it affected the demurrant*. It was improperly allowed to extend to the bill as it affected the other defendants. By what right did the District speak for codefendants who, after the court overruled the motion made April 26, 1879, (Rec., 27,) to vacate the absolute decree against them, had acquiesced in the decree?

5. We object to the alleged quotation from the "Governor's Answer," as contained in the brief of appellee. The introduction of it is unauthorized by any recognized practice. It is not found in the record. It is lugged into the brief under the pretext of an averment in the bill that one of the two appellants had been "*paid in full*," and that the fact would "fully appear" in said document. The averments were admitted by the demurrer; and the demurrant is estopped from denying either of them. A question of fact cannot be tried on demurrer. If the bill had averred that the fact could be proved by John Smith, could the demurrant produce a letter from Smith in contradiction?

6. The counsel for appellee quotes a passage from an opinion of the local court in the case of the *District of Columbia vs. the W. & G. RR. Co.*, (13 Wash. L. Rep., 796), as if it were applicable to the case at bar. If it were, it is in our favor, for the "*intent*" of the United States in making payment was surely to *extinguish* the assessment. The case was: A, having a just claim against B for work and materials, executes without color of right and sells to D and others a mortgage on B's real estate. In an action of assumpsit by A on the claim B pleads A's wrongful act in bar to the action. Held, demurrable.

The case at bar is: A having for more than fifty years done certain work for B, and having been punctually paid each year, does work of the same kind in 1871 for B, charges it up to him, presents his bill to him, and receives payment in full. Afterwards, on discovering that by an arrangement between B and C the latter might have been called on to pay the debt, A attempts to collect the amount a second time by proceedings against C. The plea of C is that the debt has been paid. Is it not good?

The fact that under its charter (Sec. 13), the appellant's property is subject to assessment for street improvements, must be taken with the fact that from the date of the city charter of 1820, the United States had paid its just proportion of the expense of improving streets bordering on the public reservations. (13 U. S. St., 69.) It must be remembered, too, that the Market Company's charter was not enacted until May 1, 1870; that the first incorporators refused to accept it, and that, after considerable delay, an organization was formed under section 15 which accepted it. Whether the improvements of April, 1871, were made before or after acceptance does not appear in the record. The contemporaneous construction of the law by Congress and the Board of Public Works was that the United States was the party liable, and the assessments and payments were made accordingly.

The assessments were afterthoughts, and were attempts under pretext of law to collect the sums a second time.

THE LAW REPORTER PRINT.

Office Supreme Court U. S.
FILED
OCT 20 1890
JAMES H. McKENNEY
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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1410

THE WASHINGTON MARKET COMPANY,
APPELLANT,

vs.

THE DISTRICT OF COLUMBIA, ET AL., APPELLEES.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The bill in this case was filed against the District and the then Commissioners of the District and the then Treasurer of the United States in his capacity of commissioner of the sinking fund. It prayed that the injunction issue against "the Commissioners of the District" and the "defendants."

The third section sets out that the United States is the owner of reservation No. 7, which is the site of the market of the complainant, and that by act of Congress the complainant was authorized to locate and construct a market-house thereon, and to use it as such for the period of ninety-nine years, and "it thereby became the tenant of the said United States, possessed of only a limited estate in said Reservation No. 7." This statement of the relations between the complainant and the United States leaves out several elements that bear a very important part in this controversy. We therefore call attention to the 13th section of the charter, which is as follows:

Sec. 13 And be it further enacted, that the real estate herein described is hereby invested in the said corporation for and during the said term of ninety-nine years, or until a forfeiture of its rights and privileges by a breach of the conditions herein imposed on said company, and said estate

shall be taken and considered as a determinable fee. The real and personal property of said corporation shall be subject to assessment and taxation for all District and municipal purposes, in the same manner and to the same extent that like property in the city of Washington owned and possessed by individuals is liable to assessment and taxation.

The fifth paragraph of the bill avers that the Board of Public Works improved North B street, between 7th and 9th at a cost of $14,262.87; that said board at first assessed the whole cost of the said improvement against the United States, and that the Treasurer of the United States, "with full knowledge of the facts on his part," paid the said assessment in full, as fully appears in a certain official publication entitled "District Affairs, Governor's Answer," pages 419, 420.

It is further averred that the money so paid by the United States has never been repaid, but that, notwithstanding that fact, the Board of Public Works assessed against the complainant for the said improvement of B street, between 7th and 9th, the sum of $4,402.45, and, upon complainant's refusal to pay, issued against its property a certificate of indebtedness for said sum of $4,402.45, and deposited it with the commissioner of the sinking fund, the defendant, James Gilfillan.

The sixth paragraph alleges "that, aside from the entire illegality of the said assessment and certificate because of the previous payment by the United States of the whole cost of said improvement." The assessment is "grossly and fraudulently excessive," and that the amount "properly chargeable against the 498 feet 8 inches occupied by the complainant was $2,079.44."

The 7th and 8th paragraphs set up the same condition of fact in regard to the improvement of 7th street northwest adjacent to complainant's property, and it is alleged that the amount assessed against it on account of said improvement is $1,691.85, whereas its proportionate share of the cost thereof would be only $1,426.16.

The District demurred to the bill; the other defendants did not answer, and a decree pro confesso was taken against

them December 21, 1878, which was made absolute April 2, 1879.

A motion was made on the 7th of April, 1879, to set aside the decree making the pro confesso absolute and for leave to plead, which, in the absence of counsel for the defendants, was, on the 8th of November, 1879, overruled. Instead, however, of simply enjoining the defendants, Phelps, Twining, Dent, and Gilfillan, as prayed in the bill, an injunction was issued against them and "their successors in office."

Upon hearing the demurrer, the justice holding the special term dismissed the bill, from which the complainant appeals.

The sole ground on which the complainant bases its claim that the assessment complained of is entirely illegal is that the United States has paid the whole amount assessed against its property, and in proof of that fact it refers to the "Governor's Answer," pages 419--420.

On page 419 is the following:

"B Street North, Sixth to Fourteenth Street West.

47,500 cu. yds. of grading; 60 cents	$28,500 00
6,584 linear feet curb, $1.50	9,876 00
18,250 sq. yds. blue rock pavement, $1.50 . . .	27,375 00
7,086 sq. yds. Belgian pavement less one-sixth, 1,181 sq. yds., 5,905 sq. yds., $3.50	20,667 50
	$86,418 50
Deduct payment made July, 1873	28,632 50
	$57,786 00"

On page 420, under head of

Recapitulation.

"B Street North, Sixth to Fourteenth Street West, $57,786.00."

These are the only entries on the pages mentioned referring to this work.

The map of the city and the original plan show that the United States owns none of the lots or squares between Sixth and Fourteenth streets, adjacent to the north side of north B street, except Reservation No. 7, which had passed,

for all taxing purposes, to the complainant. Now, there is nothing in the Governor's answer that alleges that the amount charged against the United States is the whole cost of the work done on B street, and the court, under the demurrer, while, of course, accepting as facts all the statements contained in the bill, will not impart into the statement referred to the additional fact that the charge there made is for the whole of the work, in the teeth of the fact that other parties were liable for the taxes on the north side.

We contend, therefore, that there is no allegation of fact that will sustain the contention of the bill that all the cost of the improvement on B street, between Seventh and Ninth streets, was ever assessed against or paid by the United States.

The language of the appropriation act shows that no money was to be paid for this work except in accordance with the general plan of contribution for that purpose, to wit, if the United States owned land on both sides of an improvement it was to pay the whole cost; if they owned only on one side they were to pay one-half of the cost. The language is "to reimburse the Board of Public Works for work done around Government reservations not heretofore paid," "to complete improvements of streets and avenues now in progress opposite and around Government property."

This act was approved March 3, 1873; the work on B street was done, according to the bill, in April, 1871; it is evident, therefore, that it should have been paid for out of the appropriation "to reimburse the Board of Public Works," rather than the one "to complete improvements," &c.

If, therefore, the Government did appropriate money to "reimburse the Board," the reasonable interpretation of such language is that the Government advanced this money for the present relief of the Board, but not with any idea that the complainant was to be relieved of its proper share of the cost of the improvement, from which it derived much greater benefit than the Government or the citizens of the District.

The language of the bill is, "thereupon the said Board of Public Works assessed the United States as owner of all the property adjoining said improvement the full cost thereof." The intention of this language is to imply that the assessment against the complainant was a second assessment, made after the power of the Board was exhausted, and a statement of counsel interpolated in the record so styles it. But the Board of Public Works had no power to make assessments against the United States. It is not to be presumed that they attempted to do so, but if they did it was an utterly vain attempt. All they did do and all they could do was to present a statement to Congress of work done, for which, under the existing understanding, for it never was a law, the United States was willing to pay, and if they did more than this, or included work for which this complainant was liable to be assessed, they went beyond their duty, and if they obtained money from the United States which they ought not to have paid that is the affair of the United States and not of this complainant. Such action could not relieve the Board of Public Works of their duty to assess this property just as all other property was assessed, nor the complainant of the obligation to pay its share of the cost of the improvement just as all other property-owners had to pay their shares.

But suppose that the cost of this improvement was erroneously "assessed" against the United States, and that the amount so "assessed" was paid in full by the Assistant Treasurer of the United States, "with full knowledge of all the facts on his part and on the part of the other auditing officers of the United States," how could that afford any pretext for a claim, on the part of the complainant, that a court of equity should interpose its extraordinary remedy, by injunction, to protect it from paying what nothing but the utter disingenuousness of the bill prevents it from acknowledging as a just and legal charge against it?

In the case of the District of Columbia vs. W. G. & R. R. Co., 13 Wash. L. Rep., p. 793, the railroad company undertook to set up a defense similar to that of the complainant

in this case. The Board of Public Works had made out certificates of assessment against the property of the railroad company for its share of the cost of the improvement of the streets over which its track had been laid, and had sold them to the First National Bank of New York. The assessments had not been paid, and it was "agreed on all hands" that the Board of Public Works had no power to issue such certificates. The railroad refused to pay the share of the cost of the improvements for which it was liable under the law, and the District brought suit to recover it. This court says:

"Now it is said that they are claiming in this suit to recover that identical money back again that they had already received, and that they ought not to be allowed to do it. At first glance this defense seems to be a very plausible one, yet after all it amounts to this, that though the defendant has not paid the debt the law imposed upon it, yet it ought to be discharged entirely, because the District has tried to realize money on that obligation from another quarter. The case might be likened to an action on a promissory note by a party other than the maker, who takes up the note and holds it; the note is not extinguished as against the maker because one goes and pays it and holds it. It depends entirely upon the intent with which it is done whether the debt is extinguished as the debt of the maker or not. * * * Now, when these certificates were assigned to the First National Bank it was not the intention of either of these parties that the obligaion of the company to pay the money should be extinguished. Not at all. * * * It is now agreed upon all hands, however, that the Board of Public Works were in error in reference to their powers, and that they had no right to issue any such certificates as were issued by them against the property of the defendant; that it gave nothing to the First National Bank; that it did not give to the bank a right of action against the defendant, nor did the certificate constitute a charge against the property of the defendant; that the District got the money of the First National Bank for nothing; that nothing was acquired by the first National Bank, and that, therefore, nothing was parted with by the District. Now, whether the First National Bank can recover that money from the District, as for money paid under a mistake or paid for a consideration that has failed,is a question that

does not concern this defendant. Certainly the moral obligation exists on the part of the District to return the money to the bank, but the indebtedness of the defendant remains undischarged, and the only representative of that debt is the District of Columbia. The First National Bank does not own the debt; it is still held in legal contemplation by the District, and the fact of issuing these certificates does not interfere with the right of the District to collect its debt."

This language, mutatis mutandis, covers the case at bar exactly, and it is the end of the argument as to the liability of the complainant to pay the assessments against its property for those improvements.

The allegations that the assessments are "grossly and fraudulently excessive and exorbitant" amount to nothing. An appeal from the assessments of the Board of Public Works has been twice given to the complainant and it has not availed itself of that right. It can not neglect the statutory remedy and try to cast upon this court the exercise of a discretion that has been reposed in another tribunal.

But the bill itself admits that this company should have paid $2,079.44 on the B-street improvement, and $1,426.16 on the 7th-street improvement, and yet the complainant comes into a court of equity and asks its assistance in its attempt to wriggle out of the payment of an admitted indebtedness of $3,505.60, which for thirteen years it has evaded! Surely no natural person with a capacity to blush could make such a demand.

There is no offer to pay the amount thus by implication admitted to be due, and, without being willing to do equity by paying what it owes, it asks the aid of this court in escaping a legal and equitable obligation.

The bill does not even express a willingness to pay the tax equitably due by the complainant.

But as this court says in the State railroad tax cases (92 U. S., 674) it is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can

be shown to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted.

* * * "We lay it (the above principle) down with unanimity as a rule to govern the courts of the United States in their action in such cases."

Many other authorities might be cited to the same effect, but this one is conclusive and no other is needed.

It was contended below that the bill should be dismissed only as to the District of Columbia, leaving the injunction to stand as against the other defendants, the Commissioners and the Treasurer of the United States and their successors. But the court properly refused to take this view of the case. In the first place the injunction, as appears by the record, was improvidently granted. No injunction bond was ever given, as required by Equity Rule No. 41, and the court was therefore without power to grant the injunction. Again, the parties enjoined had no interest whatever in the subject-matter of the suit, and were not necessary parties to it. An injunction against the District could have accomplished all that the complainant sought.

If the bill had not been dismissed generally a bill of review for errors apparent on the face of the record would certainly have been sustained; or if, in the last resort, no person could be found to effectuate the rights of the District, this court would undoubtedly appoint some proper person to sell the property of the complainant and to pay the taxes due by it.

We ask, with confidence, the affirmation of the decree below.

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